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COMMENTS

FUNDING LEGAL SERVICES FOR THE POOR: FLORIDA'S IOTA PROGRAM—NOW IS THE TIME TO MAKE IT MANDATORY

GREGORY A. HEARING

IOTA¹ is the acronym for Florida's Interest on Trust Account program, wherein client trust funds are pooled to generate interest to be used to provide legal services to the poor and for other public purposes. Lawyers have been depositing client funds in trust accounts for generations. Typically, if a client's funds are significant in amount, they are deposited in a separate interest-bearing account. If they are not, the funds are placed in a non interest-bearing trust account with other client funds also relatively small in amount. A typical IOTA plan pools these small or short-term amounts in one interest-bearing demand account. Interest earned is transferred to the state bar or state bar foundation which distributes it to various organizations to subsidize legal aid programs.

During its brief existence,² Florida's program has survived complex trust, tax and banking law problems and has overcome charges that the program's use of funds generated by the commingling of client trust funds violates professional ethics rules. The IOTA program, however, faced its greatest challenge in *Cone v. Florida Bar*.³ In *Cone*, which commenced in 1984, Ms. Evelyn Glaeser claimed that the \$2.25 interest generated on her \$13.75 principal held in trust by the law firm of Holland & Knight and used in Florida's IOTA

1. For the sake of clarity, this author will use the IOTA acronym to denote all programs, whether labeled IOTA or IOLTA. Although the IOLTA acronym is used more widely, at least one commentator has called it a misnomer, stressing that what is involved in all programs is not interest on lawyer trust accounts, but rather interest on client trust funds held by lawyers. Marsh, *IOLTA Should Be Rejected*, 70 A.B.A. J. 16 (1984).

2. Florida's IOTA program was first authorized by judicial rule in 1978 in *In re Interest on Trust Accounts*, 356 So. 2d 799 (Fla. 1978), but was not implemented until 1981. *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981).

3. 626 F. Supp. 132 (M.D. Fla. 1985), *aff'd*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 108 S. Ct. 268 (1987).

program was taken without just compensation.⁴ Glaeser, however, failed to persuade the United States District Court for the Middle District of Florida⁵ and the Eleventh Circuit Court of Appeals⁶ that the use of her money constituted a violation of the taking clause of the fifth amendment to the United States Constitution.⁷ Recently, the United States Supreme Court denied her petition for certiorari,⁸ thereby drawing to a close the "taking" controversy which had shadowed the IOTA program for years.

Glaeser's challenge to the IOTA program was watched closely by both laymen and lawyers for two principal reasons: hers was the first such challenge to be heard in the federal courts⁹ and, by the summer of 1988, forty-seven states and the District of Columbia had followed Florida's lead and adopted IOTA programs.¹⁰ When Florida's program withstood constitutional scrutiny in the Eleventh Circuit Court of Appeals, IOTA programs nationwide dodged a potentially fatal blow. Nonetheless, the future of the IOTA concept is unclear. Participation in Florida's voluntary program has been low, resulting

4. *Id.* Ms. Glaeser also alleged that the IOTA program violated the due process clause of the fourteenth amendment and constituted conversion of property and breach of fiduciary duty. *Id.* at 133 n.2.

5. See *Cone*, 626 F. Supp. 132.

6. See *Cone*, 819 F.2d 1002.

7. U.S. CONST. amend. V. It is well settled that the fifth amendment applies to the states through the fourteenth amendment. See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

8. *Cone v. Florida Bar*, 108 S. Ct. 268 (1987).

9. IOTA programs have been challenged in at least one adversarial state court proceeding, *Carroll v. State Bar of Cal.*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (Ct. App. 1984), *cert. denied sub nom.* *Chapman v. State Bar of Cal.*, 474 U.S. 848 (1985), and deemed constitutionally sound by several state supreme courts in non-adversarial judicial proceedings, including the Supreme Court of Florida. See, e.g., **Florida**: *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981); **Iowa**: *In re Iowa State Bar Ass'n*, No. 84-1641 (Iowa 1984), *cert. denied sub nom.* *Ronwin v. Supreme Court of Iowa*, 471 U.S. 1101 (1985); **Massachusetts**: *In re Massachusetts Bar Ass'n*, 395 Mass. 1, 478 N.E.2d 715 (1985); **Minnesota**: *In re Minnesota State Bar Ass'n*, 332 N.W.2d 151 (Minn. 1982); **New Hampshire**: *In re New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982); **Utah**: *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); **Washington**: *In re Adoption of Amendments to CPR DR 9-102*, 102 Wash. 2d 1101 (1984).

10. These 48 states together with the District of Columbia had generated \$136 million as of June 1988. In 1987 alone, IOTA programs nationwide disbursed \$41.8 million for legal services to the poor. *In re Interest on Trust Accounts*, No. 72,671, at 2 (Fla. filed July 5, 1988) (petition to amend rules) [hereinafter *1988 Petition to Amend Rules*]. The only two states which have not yet adopted IOTA programs, Indiana and West Virginia, are currently considering doing so. Only 30 of the 49 IOTA programs have developed to the point where they are disbursing the money raised. Marcotte, *Big Interest in Small Change*, 73 A.B.A. J. 70, 71 (1987).

in only minimal realization of financial potential.¹¹ In addition, technological advances in the banking industry could make subaccounting of the IOTA funds cost-effective and perhaps raise new "taking" questions.

In this Comment, the author surveys the nature of IOTA programs in other jurisdictions, reviews the development of Florida's IOTA program and examines the recent "taking" challenge. Finally, the author considers the future of the IOTA concept in general and the particular need for a mandatory IOTA program in Florida.

I. THE NATURE OF IOTA: BACKGROUND

It is common for a lawyer to receive thousands of dollars from clients in advance to cover costs and expenses to be incurred in such matters as real estate closings, filing fees, and litigation settlements. These funds, held in trust for the clients, are typically nominal in amount or held for such short periods of time that administrative costs would exceed the interest earned if such deposits were placed in separate accounts.¹² Consequently, most lawyers pool these client funds in non interest-bearing checking accounts.¹³

The IOTA concept evolved to tap this potentially large financial resource. A common plan pools lawyer trust accounts into an interest-bearing account. The interest earned is transferred to a state bar foundation,¹⁴ which distributes the funds to organizations which use the money for legal aid to the poor or for other law-related public purposes.¹⁵ The principal rationale behind the plan is to put the

11. The percentage of attorneys participating in Florida's program has actually dropped from 21% in 1985 to 20% in 1986, where it remained in 1987. *1988 Petition to Amend Rules*, *supra* note 10, at 4.

12. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982), *reprinted* in 68 A.B.A. J. 1502 (1982) [hereinafter ABA Formal Op. 348]. A lawyer would have to spend time to (1) determine whether investment were practical, (2) open an account for the client, (3) obtain the client's social security or tax identification number, and (4) perform other bookkeeping tasks.

13. *Id.*

14. Florida's plan dictates that The Florida Bar Foundation receive the interest. *In re Interest on Trust Accounts*, 356 So. 2d 799 (Fla. 1978). However, bar foundations are not necessarily the only entities designated recipients of the funds: the State Bar of California, the Maryland Legal Services Corporation, and the Minnesota Supreme Court are recipients in their respective states. **California:** CAL. BUS. & PROF. CODE § 6212 (West Supp. 1984); **Maryland:** MD. ANN. CODE art. 10, § 44(a)(2) (1982); **Minnesota:** *In re Minnesota State Bar Ass'n*, 332 N.W.2d 751 (Minn. 1982).

15. Florida's determination that the funds be used for legal aid to the poor, improvement of the administration of justice and for law student loans is typical. *See In re Interest on Trust Accounts*, 372 So. 2d 67 (Fla. 1979). Yet some states have designated at least a portion of the interest earned for other purposes. Maine's program permits lawyers to earmark interest earned for any charitable, nonprofit program. North Carolina has designated some funds to improve attorney grievance procedures. Other states have used interest to fund mediation projects. Marcotte, *supra* note 10, at 71.

money to public use rather than to allow the banking industry to benefit from free use of the money.¹⁶

Implementation of the IOTA program has not come easily. Its very existence contradicts a doctrine which "has been drilled into every lawyer since time immemorial: thou shalt in no way tamper with a client's money."¹⁷ Nevertheless, in 1982 the ABA Committee on Ethics and Professional Responsibility (the Committee) declared participation in an IOTA program to be ethical.¹⁸ The Committee found nothing in the Model Code of Professional Responsibility (Model Code) to prohibit an attorney's placing a client's funds in an interest bearing account, provided the Model Code's Disciplinary Rule 9-102, which bars lawyers from mishandling client funds, is not breached.¹⁹ The Committee stressed that "[t]he thrust of D.R. 9-102 is that lawyers must neither misuse a client's funds nor impede their prompt delivery. The focus is on safekeeping, accounting, and delivery, and not on investment of the funds."²⁰ The Committee, however, pointed out that lawyers can not set up pooled trust funds and retain the interest for themselves.²¹ Citing two informal decisions²² concerning the use of interest earned on client trust funds under Canon 11, the Committee concluded that those decisions would be the same under the Model Code.²³

Participation in the IOTA plan must be within the sole discretion of the lawyer, as any client participation in this decision would subject the client to tax liability on earned interest through the assignment of income doctrine.²⁴ Often the decision whether funds are

16. *In re Interest on Trust Accounts*, 356 So. 2d 799, 802 (Fla. 1978).

17. Rivlin, *I.O.L.T.A. Gains Momentum Nationwide*, 69 A.B.A. J. 1036 (1983).

18. See ABA Formal Op. 348, *supra* note 12, at 1502.

19. *Id.* at 1502 (discussing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1980)).

20. *Id.* at 1503.

21. *Id.* The Committee relied on Canon 11, which provides in pertinent part: "Money of the client . . . or other trust property . . . should not under any circumstances be commingled with [the lawyer's] own or be used by [the lawyer]." *Id.* (citing CANONS OF PROFESSIONAL ETHICS Canon 11 (1908)).

22. See ABA Comm. on Professional Ethics, Informal Dec. 545 (1962) (even where it is impossible to allocate the interest earned on pooled client funds among clients, a lawyer who retains the interest would be acting in violation of Canon 11); ABA Comm. on Professional Ethics, Informal Op. 991 (1967) (a lawyer's use of interest earned on a pooled client fund savings account to defray costs of a law firm's agency account would violate Canon 11).

23. ABA Formal Op. 348, *supra* note 12, at 1504. The Committee noted that, "[a]lthough D.R. 9-102 does not carry forward the precise language from Canon 11 . . . , the disciplinary rule, when read in its entirety, clearly continues the strict requirements for notice, accounting, and prompt payment of funds to the client" set forth in Canon 11. The Committee also noted that there was "no intention by the drafters of the Model Code to relax in any manner the long-standing restrictions on a lawyer's use of client funds." *Id.*

24. See *infra* text accompanying notes 54-58 (discussing IRS rulings that relate to IOTA).

sufficiently nominal or short-term rests with the lawyer and is protected from judicial review.²⁵ However, the extent to which a lawyer has discretion to determine what constitutes a sufficiently nominal amount or a short-term period is unclear. In *Cone*, the Eleventh Circuit determined that \$13.75 was nominal—but is \$50 or \$100? Moreover, the court did not discuss what length of time it would consider short-term.²⁶ Lack of guidelines may be part of the reason why approximately eighty percent of Florida lawyers don't participate in the IOTA program.²⁷

Maryland is one state which has established firm guidelines for making such decisions. Based on a study of the costs of opening individual client trust accounts, a fifty-dollar "safe harbor" amount was established.²⁸ The Maryland legislature determined that where the amount and anticipated length of deposit would combine to generate at least fifty dollars, thereby exceeding the cost of setting up and maintaining the individual account, the funds should be deposited in an account bearing interest for the client. If the amount and anticipated length of deposit were insufficiently large, the funds would be deposited to generate funds for IOTA.²⁹ This figure may be helpful for those who participate in Florida's IOTA plan, as Florida has no such specific guidelines. Guidelines or none, the amount of

25. See *In re Interest on Trust Accounts*, 402 So. 2d 389, 394 (Fla. 1981).

26. See *Cone v. State Bar of Fla.*, 819 F.2d 1002 (11th Cir.), cert. denied, 108 S. Ct. 268 (1987).

27. Telephone interview with Jane Robertson Curran, Executive Director of The Florida Bar Foundation (Mar. 7, 1988).

28. Siegel, *Interest on Lawyers' Trust Account Programs: Do They "Take" Property of the Client?*, 36 U. FLA. L. REV. 674, 678 n.12 (1984). The following chart has been used to assist lawyers in determining whether the "safe harbor" would be met:

Principal Deposit	Number of Days Required to Generate \$50 Interest at 5 $\frac{1}{4}$ % Compounded Daily
\$ 500	654
1000	335
2000	169
5000	69
10000	34
20000	17
30000	12

Id. at 679 (citing REPORT TO BD. OF GOVERNORS, ABA TASK FORCE AND ADVISORY BD. ON LAWYER TRUST ACCOUNTS 24 (1982)).

29. Siegel, *supra* note 28, at 674 n.12. Maryland's program is codified in MD. ANN. CODE art. 10, §§ 44-45 (1982).

the trust deposit and the time it will be held in the account should be the controlling factors in the determination of participation.

II. OTHER JURISDICTIONS

Florida's IOTA plan, the first in the United States, was not the first of its kind worldwide. Those who conceived the implementation of an IOTA plan in Florida undoubtedly were inspired by programs in other nations.

A. Foreign IOTA Programs

At least seventeen foreign jurisdictions had adopted IOTA programs prior to Florida's implementation in 1981.³⁰ At that time, IOTA plans were operating in five Australian states, nine Canadian provinces, the Republic of South Africa, South West Africa, and Rhodesia.³¹ Common elements of these foreign programs included: computation of interest earned on client trust funds through reference to an average minimum account balance; transfer of interest directly to a law foundation for disbursal; and allocation of interest to subsidize a variety of programs designed to improve the administration of justice as well as to pay the claims of clients who, for whatever reason, did not receive their trust funds.³²

The Canadian plans had considerable influence on the development of Florida's program. Former Florida Supreme Court Justice Arthur England, generally recognized as the first to suggest Florida's adoption of IOTA, had studied the IOTA plans of the Canadian provinces of Ontario and of British Columbia, which had been adopted statutorily in 1969.³³ The then newly-formed Law Foundation of British Columbia began receiving interest on lawyers' trust accounts in 1970.³⁴ Although the voluntary plan generated only

30. *In re Interest on Trust Accounts*, 356 So. 2d 799, 803 (Fla. 1978).

31. The five Australian states were New South Wales, Queensland, South Australia, The Australian Capital Territory and Victoria. The nine Canadian provinces were Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan. *Id.* at 803 n.25.

32. *Id.* at 803. The Florida Bar has a similar client claims program, separate from IOTA, called the "Client Security Fund," whereby a portion of the Bar's annual dues are deposited in a fund to be paid to those clients who for whatever reason did not receive any or all of their trust funds.

33. *Id.* at 804 n.29. See B.C. REV. STAT. ch. 15, § 15 (1969). Florida's plan is not statutory; it is judicially authorized pursuant to art. V, § 15 of the Florida Constitution. The ABA recently named Former Chief Justice England a 1988 Pro Bono Publico Award recipient, in recognition of his introduction of the IOTA concept into the United States. 74 A.B.A. J. 125 (1988).

34. *Trust Accounts*, 356 So. 2d at 804 n. 29.

\$250,000 in its second year of operation, after it was made mandatory in 1976 the program generated over \$2 million annually.³⁵ The Law Foundation of British Columbia utilized the funds primarily to provide legal aid to the poor, subsidize law libraries and finance law reform projects.³⁶ The Supreme Court of Florida noted that many features of the British Columbia plan would be "readily adaptable to a similar program in Florida."³⁷

Although the Australian programs differ from state to state, all but one share certain characteristics.³⁸ These programs mandate that every attorney transfer between one-third and two-thirds of the lowest balance of a client trust account to the appropriate legal association, which must promptly invest the funds. These funds may be withdrawn by the attorney at any time and do not include monies which a client has specifically requested be invested. The income generated from the funds must be used for some type of legal assistance to the poor.

B. IOTA Plans in the United States

IOTA programs come in three varieties: voluntary, opt-out, and mandatory, the last often referred to as "comprehensive."³⁹ In states with voluntary programs such as Florida's, attorneys who maintain trust accounts may elect to participate but are not compelled to do so.⁴⁰ In jurisdictions with opt-out plans, an attorney must affirma-

35. *Id.* at 804.

36. *Id.*

37. *Id.* One commentator has noted that some features of foreign plans have not been incorporated into any United States IOTA plan. Examples of such features include the use of a uniform interest rate for IOTA plans by banks and statutory prohibitions of IOTA-related claims against participating lawyers. See Note, *Minnesota's New Interest on Lawyer Trust Accounts Program*, 67 MINN. L. REV. 1286, 1290 (1983).

38. Boone, *A Source of Revenue for the Improvement of Legal Services, Part I: An Analysis of the Plans in Foreign Countries and Florida Allowing the Use of Clients' Funds Held by Attorneys in Non-Interest-Bearing Trust Accounts to Support Programs of the Organized Bar*, 10 ST. MARY'S L.J. 539, 543-44 (1979) [hereinafter Boone, *Part I*].

39. A comprehensive IOTA program requires an attorney either to place client funds in an interest-bearing account for the client or to pool the funds in an account to earn interest for IOTA. Therefore, this author will refer to this type of program as "mandatory," except when specifically referring to other states' comprehensive programs.

40. The 29 states with voluntary programs are Alaska, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Vermont, Virginia and Wyoming. The number of lawyers with trust accounts who participate in these states range from 60% in Maine to 9% in Georgia, and average approximately 29%. 1988 *Petition to Amend Rules*, *supra* note 10, at 3.

tively act in order to refuse participation in the program.⁴¹ States that operate mandatory programs require attorneys either to place client funds in an account to earn interest for the client or to place the funds in an account to earn interest for IOTA.⁴²

Beyond the mandatory-voluntary distinctions, differences among state programs are of a formalistic, and not a substantive, nature. Every state plan provides for the transfer of interest earned on client trust accounts to a designated legal association. The interest earned is used for the advancement of law-related public purposes, such as legal aid to the poor, law student scholarships and the administration of justice.

III. THE DEVELOPMENT OF FLORIDA'S IOTA PROGRAM

Four Florida Supreme Court decisions spanning several years have shaped the IOTA program to its present form.⁴³ In 1971, The Florida Bar began gathering information on IOTA programs operating in foreign jurisdictions. Following five years of study,⁴⁴ and their formal adoption of the IOTA concept, The Florida Bar and The Florida Bar Foundation⁴⁵ presented a petition to the Supreme Court of Florida requesting amendments to the Integration Rule and the Florida Code of Professional Responsibility to effectuate the adoption of an IOTA program.⁴⁶

The court's opinion set forth the features of the Bar's proposal⁴⁷

41. The nine jurisdictions with opt-out plans are Alabama, Delaware, Montana, New Jersey, Pennsylvania, Rhode Island, South Carolina, Utah and the District of Columbia. *Id.*

42. The 10 states with comprehensive programs are Arizona, California, Illinois, Iowa, Michigan, Minnesota, North Dakota, Ohio, Washington and Wisconsin. *Id.*

43. *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981); *In re Interest on Trust Accounts*, 396 So. 2d 719 (Fla. 1981); *In re Interest on Trust Accounts*, 372 So. 2d 67 (Fla. 1979); *In re Interest on Trust Accounts*, 356 So. 2d 799 (Fla. 1978).

44. Florida Supreme Court Justice Arthur England presented a detailed proposal to The Florida Bar's Board of Governors in 1976. England & Carlisle, *History of Interest on Trust Accounts Program*, 56 FLA. B.J. 101, 102 (1982).

45. The Florida Bar Foundation (the Foundation) was chartered as a non-profit corporation in 1956 with limited membership. Prior to IOTA, the Foundation was little more than a public relations branch of The Florida Bar with declared purposes ranging from maintaining the honor and integrity of the legal profession to improving relations among The Florida Bar, the judiciary, and the public. With the advent of IOTA, the Foundation amended its charter and extended its membership to virtually all who participated in the IOTA program. See Young, *The Florida Bar Foundation: A History*, 56 FLA. B.J. 108 (1982).

46. *In re Interest on Trust Accounts*, 356 So. 2d 799, 800 (Fla. 1978).

47. The Bar's proposal contained the following features: (1) The plan would be voluntary; (2) The plan would be implemented through the Bar's Board of Governors' bylaws, rather than under Integration Rule 11.02(4); (3) Funds would be invested in savings accounts or in U.S. securities; (4) Attorneys would be allowed to set up three types of trust accounts: interest-bearing "special accounts" for individual clients, interest-bearing "registered ac-

and the principal criticisms of the plan.⁴⁸ Stressing that the plan breached no ethical standards, the court found rejection of the plan unwarranted.⁴⁹ Consequently, the court amended Florida Bar Integration Rule 11.02(4) to provide that interest earned on client funds in authorized savings accounts be paid to The Florida Bar Foundation. The Bar gave lawyers the freedom to decide whether to participate in the program, provided that lawyers first obtain client consent.⁵⁰ Noting that federal banking regulations historically barred interest payments on demand accounts,⁵¹ the court authorized the use of only those savings accounts which provided for the immediate withdrawal of funds.⁵² The court also suggested that the Bar amend the Foundation's charter to provide for implementation and authorized use of the funds for seven purposes:

- (a) to provide legal aid to the poor;
- (b) to provide for the adequate delivery of legal services to all members of the public;
- (c) to augment the client security fund with a view toward full reimbursement;
- (d) to fund a more expeditious and efficient grievance mechanism;

counts" for multiple clients, and non-interest bearing "general accounts" for multiple clients; (5) Interest earned would be transferred to The Florida Bar to fund programs designed to provide legal services to the poor, bolster the client security fund (which reimburses clients whose trust money is misappropriated by their attorney), provide student loans, and improve the administration of justice; and (6) There would exist a presumption of client preference for participation in the program. *Id.* at 804-05.

48. Opponents of the Bar's plan argued: (1) The public should not pay for Bar programs; (2) The plan conflicts with the Code of Professional Responsibility, tarnishes the propriety of the legal profession, creates a potential conflict of interest, and provides an incentive for attorneys to bargain for financing favors with banks in exchange for their promise not to participate in the plan; (3) The Bar presented no factual support as to present banking procedures of attorneys with respect to client trust funds; (4) The IOTA plan seeks to circumvent federal law which prohibits the payment of interest on demand accounts; (5) Banks can postpone withdrawals on savings accounts for 30 days, so client funds may not be available for immediate withdrawal; and (6) Banks will be burdened with additional costs for which they will not be compensated. *Id.* at 805-06. For a generalized critique of the Florida program, see Boone, *Part I, supra* note 38, at 556-63. See also Note, *A Critique of Interest on Lawyers' Trust Accounts Programs*, 44 LA. L. REV. 999 (1984).

49. *In re Interest on Trust Accounts*, 356 So. 2d 799, 806 (Fla. 1978).

50. *Id.* at 807.

51. *Id.* at 801, 802 (citing 12 U.S.C. § 371(a) (1945), which states in part: "No [bank] shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand."). The court did note, however, that the Federal Reserve Board had asked Congress to make available throughout the nation Negotiable Order of Withdrawal (NOW) accounts, which are similar to demand accounts but remit interest at rates comparable to savings accounts. *Id.* For a thorough discussion of federal banking laws regarding interest on savings and checking accounts, see Siegal, *supra* note 28, at 681-91.

52. *Trust Accounts*, 356 So. 2d 799, 807 (Fla. 1978).

- (e) to provide student loans;
- (f) to improve the administration of justice; and
- (g) for such other programs for the benefit of the public as are specifically approved by the Court from time to time.⁵³

The Bar Foundation did not implement the IOTA program as originally authorized because it encountered difficulties with the Internal Revenue Service (IRS). After the supreme court authorized the program, the Foundation requested an IRS ruling to clarify that the proposed use of the IOTA funds would not jeopardize its tax exempt status.⁵⁴ The IRS determined that funds generated by IOTA accounts could be used in only four of the seven ways approved by the supreme court.⁵⁵ To avoid the threat of losing its tax exempt status, the Foundation in 1979 proposed striking the uses the IRS had found objectionable; the supreme court agreed to do so.⁵⁶

The program's IRS troubles did not end with the controversy over the fund's uses. Pursuant to the Foundation's request that interest earned in the IOTA program be declared income to the Foundation rather than to the lawyers' clients, the IRS determined that the provision requiring client consent would invoke the assignment of income doctrine, thereby making the client liable for the tax on the interest earned in the IOTA account.⁵⁷ The Foundation informed the

53. *Id.* at 811.

54. England & Carlisle, *supra* note 44, at 103.

55. *In re Interest on Trust Accounts*, 372 So. 2d 67, 68 (Fla. 1979). Three uses were omitted because they were threats to the Foundation's tax-exempt status: the provision of adequate delivery of legal services to all members of the public, the augmentation of the Bar's client security fund, and the funding of a more expeditious and efficient grievance mechanism. *Id.* at n.4.

56. *Id.* at 68.

57. *In re Interest on Trust Accounts*, 402 So. 2d 389, 390 (Fla. 1981). The assignment of income doctrine, set forth in *Commissioner v. Earl*, 281 U.S. 111 (1930), provides that the person who generates income through personal services or the use of property, but assigns it to a third party to avoid tax liability, is the one who is taxed. *Commissioner v. Horst*, 311 U.S. 112 (1940), dictates that the person who directs or controls the income is the person who realizes the income and therefore must bear the tax burden. The fruit of the tree metaphor is applicable to the IOTA program. Client trust funds are the tree and the interest earned on their use in the program is the fruit. The IRS' likely view of the initially authorized 1978 program was that the clients would have had control of their trees (their trust funds), and that the clients' consent would have constituted the direction that the fund's fruit be paid to the Foundation. This action would constitute assignment of income. It follows that an IOTA program in which the client has no control of the tree and fruit, or its use, would not constitute assignment of income.

One commentator describes an IOTA supporter's likely view of the fruit and tree analysis as follows: "Under the plans, the client/assignor owns the tree, but that tree can bear no fruit for the client. If the client loans or assigns the tree to a third party, then the tree will bear fruit for the third party." Boone, *A Source of Revenue for the Improvement of Legal Services*,

court that the IRS had confirmed that the Foundation would be the beneficial owner of the interest generated by the program, provided all vestiges of client control over the use or placement of the interest earned were removed. Subsequently, the Foundation petitioned the Florida Supreme Court to amend Integration Rule 11.02(4) to remove any such control.⁵⁸ The Foundation further requested that the court make the program mandatory and permit the use of NOW accounts to reflect the changes in the federal banking laws.⁵⁹ The court published the Foundation's proposals, sought comments from all interested persons, and suspended the program until it made its ruling.⁶⁰

Although the court received little response regarding the elimination of the client consent requirement, it apparently received substantial negative response to the Foundation's proposal to make the program mandatory; the proposal was denied.⁶¹ Revealing an element of frustration, the court declared that "[t]he time has come either to implement [the IOTA program], or to scrap it. We choose to implement."⁶² The court also declared that this would be its last attempt to implement the plan; thereafter it would make only minor technical changes as the need arose.⁶³ With that proclamation, the court adopted the Foundation's proposals to remove client consent and to require that NOW accounts be used in the program. Additionally, the court reaffirmed the previously adopted principles of the plan.⁶⁴

Finally, the court addressed concerns that the program would confiscate client funds in violation of the taking clause of the fifth amendment to the Constitution.⁶⁵ The court rejected the argument that *Webb's Fabulous Pharmacies, Inc. v. Beckwith*⁶⁶ was controlling.⁶⁷ In *Webb's*, the United States Supreme Court found a Florida law that declared the interest earned on funds deposited with the reg-

Part II: A Recommendation for the Use of Clients' Funds Held by Attorneys in Non-Interest-Bearing Trust Accounts to Support Programs of the Texas Bar Association and an Analysis of the Federal Income Tax Ramifications, 11 ST. MARY'S L.J. 113, 134 n.140 (1979) [hereinafter Boone, *Part II*].

58. *Trust Accounts*, 402 So. 2d at 391.

59. *In re Interest on Trust Accounts*, 396 So. 2d 719 (Fla. 1981). NOW accounts were made available nationwide as of Jan. 1, 1981. 12 U.S.C. § 1832(a) (1982).

60. *Trust Accounts*, 396 So. 2d 719.

61. *In re Interest on Trust Accounts*, 402 So. 2d 389, 393-94 (Fla. 1981).

62. *Id.* at 393.

63. *Id.*

64. *Id.* at 393-95.

65. U.S. CONST. amend. V.

66. 449 U.S. 155 (1980), discussed in greater detail *infra* text accompanying notes 100-07.

67. *In re Interest on Trust Accounts*, 402 So. 2d 389, 395-96 (Fla. 1981).

istry of a county court to be the property of the court clerk violative of the taking clause.⁶⁸ The Supreme Court of Florida distinguished the situation in *Webb's* and the present case: a true property interest existed in *Webb's*, but none existed under the IOTA program, since the program "creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances."⁶⁹ The court concluded that an argument that IOTA is unconstitutional is "attenuated beyond tenability."⁷⁰

The Supreme Court of Florida targeted September 1, 1981, as the effective date of the revised IOTA plan.⁷¹ However, a few details needed to be resolved. The IRS had yet to rule on the issue of tax liability, and federal banking regulations restricted the eligibility for NOW accounts to individuals, fiduciaries, nonprofit organizations and governmental entities.⁷² As expected, the IRS ruled that under the new IOTA rules the Bar Foundation, and not the client, would be the beneficial owner of the interest earned on client trust funds.⁷³ Unincorporated lawyers could participate in the IOTA program, but because of the federal banking restrictions on NOW accounts, it was unclear whether law firms or professional associations could participate. In August 1981, the Florida Attorney General wrote an unpublished opinion which concluded that The Florida Bar Foundation was the beneficial owner of interest earned on trust accounts of lawyers participating in the program.⁷⁴ Following this opinion, the general counsel for the Federal Reserve Board decided that all funds, including those held in law firm or professional association trusts, were eligible to be maintained in NOW accounts.⁷⁵ Thus, as of 1981, all obstacles for the effective implementation of the IOTA program had finally been removed.

Since the program's inception, generated funds have been handled solely by The Florida Bar Foundation. Distribution of the money has been governed by the Foundation's own internal guidelines. Groups wishing to receive IOTA monies must apply to the Foundation.

68. *Webb's*, 449 U.S. at 164-65.

69. *Trust Accounts*, 402 So. 2d at 395.

70. *Id.* at 396.

71. *Id.* at 396-97.

72. 12 U.S.C. § 1832(a)(2) (1982). See also 12 C.F.R. § 217.157 (1982).

73. Rev. Rul. 81-209, 1981-2 C.B. 16; see also 26 C.F.R. § 1.61-7.

74. Letter from Jim Smith, Att'y Gen. of Fla., to E. Albert Pallot, President of The Fla. Bar Foundation (Aug. 21, 1981), reprinted in Middlebrooks, *The Interest on Trust Accounts Program—Mechanics of its Operation*, 56 FLA. B.J. 115, 116 (1982).

75. Letter from Michael Bradfield to Donald M. Middlebrooks (Oct. 15, 1981), reprinted in Middlebrooks, *supra* note 74, at 117.

Grantees chosen are those the Foundation believes will best aid in the provision of legal services to the poor and in the administration of justice. The \$3.6 million earned by the IOTA program during 1987 were distributed to thirty-nine legal aid societies and to the six accredited Florida law schools for scholarships and public service fellowship stipends.⁷⁶

Constitutional questions surrounding Florida's program remained unresolved as the Foundation received and distributed money throughout Florida for three years. It was not until *Cone* that these questions were finally answered.

IV. THE *CONE* DECISION

In February 1969, Ms. Evelyn Glaeser⁷⁷ retained the law firm of Holland & Knight to probate her deceased husband's estate by paying a cost deposit of \$100, which the firm placed in a non interest-bearing trust account. The firm's work for Glaeser consumed all but \$13.75 of her deposit. Inadvertently failing to refund this amount to Glaeser, Holland & Knight retained the money in the firm's non interest-bearing account until December 1, 1981, when the firm decided to participate in Florida's IOTA program. Accordingly, the firm transferred its nominal and short-term trust account funds, including Glaeser's \$13.75, to an interest-bearing demand account. In the three years Glaeser's deposit remained there, it generated \$2.25 interest, which was transferred to The Florida Bar Foundation. Discovering its inadvertent retention of the initial \$13.75, Holland & Knight returned \$13.75 to Glaeser on September 26, 1984.⁷⁸

Glaeser brought a class action suit against The Florida Bar, The Florida Bar Foundation, and Holland & Knight⁷⁹ to recover her own interest and all the interest earned through the program to date.⁸⁰ Federal judges in the Middle District of Florida recused themselves,

76. Telephone interview with Jane Robertson Curran, Exec. Dir. of The Fla. Bar Foundation (Mar. 7, 1988).

77. Glaeser died after commencement of her suit but was replaced by Jean Ann Cone, the personal representative of her estate. *Cone v. State Bar of Fla.*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 108 S. Ct. 268 (1987). For purposes of this Comment, all references will be made to Glaeser as the plaintiff/appellant.

78. *Id.* at 1003-04.

79. The defendants consisted of The Florida Bar, The Florida Bar Foundation, and Holland & Knight as representatives of a class of lawyers and law firms participating in the IOTA program.

80. *Cone*, 819 F.2d at 1004. Approximately 30 state bar associations and 27 IOTA programs such as legal aid societies joined in an *amicus* brief on behalf of the defendants. Marcotte, *supra* note 10, at 70.

and a federal judge from Alabama sat by designation.⁸¹ In the suit, Glaeser alleged that the appropriation of interest earned on her money by the program constituted an uncompensated taking of her property in violation of the fifth amendment,⁸² a denial of due process and a breach of fiduciary duty.⁸³

The district court determined that resolution of Glaeser's claim rested on whether interest earned on nominal or short-term funds held in an IOTA account is property of the client for the purposes of the fifth amendment.⁸⁴ Glaeser relied on the property doctrine that interest follows principal to argue that she was the owner of the \$2.25 interest.⁸⁵ The court disagreed: the argument "that 'interest goes with the principal, as the fruit with the tree,' necessarily assume[s] the existence of a fruit-bearing tree."⁸⁶ The court pointed out that federal banking regulations precluded a law firm from maintaining a NOW account for the private investment of client funds and emphasized that even if her law firm could have set up such an account, bank service charges and administration costs would have devoured Glaeser's interest *and* principal.⁸⁷ Concluding that no protectible property interest existed, the court held that Florida's IOTA program did not violate any protected property interest.⁸⁸ In essence, Glaeser's tree could not bear fruit.

The district court assumed for argument's sake that even if a protectible property interest existed, Florida's IOTA program did not violate the taking clause.⁸⁹ This challenge, the court concluded, involved a regulation of the use of property for the public good rather than a physical invasion. The court found *Andrus v. Allard*⁹⁰ persuasive in the context of the court's assumed argument.⁹¹ In *Andrus*, the plaintiffs claimed that a law prohibiting the sale of rare migratory birds constituted an unconstitutional taking in that it deprived the plaintiffs the opportunity to earn a profit from the sale of such

81. The Alabama judge sitting by designation was the Honorable Seybourn H. Lynne. *Cone v. Florida Bar*, 626 F. Supp. 132 (M.D. Fla. 1985), *aff'd*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 108 S. Ct. 268 (1987).

82. U.S. CONST. amend. V.

83. *Cone*, 626 F. Supp. at 133 n.2. The plaintiff also alleged that this taking constituted conversion of property. *Id.*

84. *Id.* at 133.

85. *Id.* at 135.

86. *Id.* at 136 (quoting *Himely v. Rose*, 9 U.S. (5 Cranch) 313, 319 (1809)).

87. *Id.* at 136.

88. *Id.* at 137. The court, finding the property interests protected by the taking and due process clauses identical, dismissed both the fifth amendment and due process claims.

89. *Id.*

90. 444 U.S. 51 (1979).

91. *Cone*, 626 F. Supp. at 137.

birds. The United States Supreme Court upheld the governmental regulation, applying a "bundle" and "strand" theory of property rights: "The denial of one traditional property right does not always amount to [a] taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."⁹²

The district court determined that the IOTA program did not interfere with Glaeser's "bundle" of property rights since she was able to withdraw her funds and use them in any way she wished: "At most, IOTA affects merely one strand of property rights by putting otherwise dormant, non-productive, nominal or short-term client trust deposits to work to improve the legal system."⁹³

On appeal, the Eleventh Circuit affirmed.⁹⁴ Implicit in the circuit court's opinion is the requirement that Glaeser demonstrate a constitutionally recognized property interest to show a violation of the fifth amendment's taking clause.⁹⁵ Relying on *Board of Regents v. Roth*,⁹⁶ the court determined that for Glaeser's property interest to rise to the level of a constitutionally protected property interest, she must show that she had a specific and legitimate "claim of entitlement" to the \$2.25.⁹⁷ Such a claim of entitlement, the court explained, could be based on a mutually explicit understanding or on positive rules of substantive law.⁹⁸

The court concluded that neither the history of Florida's IOTA program nor federal banking regulations could have created a mutually explicit understanding between Glaeser and Holland & Knight that her \$13.75 would be pooled with other nominal or short-term

92. *Andrus*, 444 U.S. at 65-66.

93. *Cone*, 626 F. Supp. at 137.

94. *Cone v. State Bar of Fla.*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 108 S. Ct. 268 (1987).

95. For a thorough discussion of the taking clause in the IOTA context, see Siegal, *supra* note 28, at 720-53. See also Baker & Wood, "Taking" a Constitutional Look at The State Bar of Texas Proposal to Collect on Attorney-Client Trust Accounts, 14 TEX. TECH. L. REV. 327 (1983).

96. 408 U.S. 564 (1972). In response to a procedural due process challenge, the Supreme Court stated in pertinent part: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. The Supreme Court has stated that the due process clause, like the taking clause, protects constitutionally recognized property interests and that the standard used in the determination of the existence of a property interest is identical for both clauses. See *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

97. *Cone*, 819 F.2d at 1004.

98. *Id.* (citing *Perry v. Sinderman*, 408 U.S. 593 (1972)).

funds and invested to generate interest for her. The court emphasized that the IOTA program was set up to earn interest only for The Florida Bar Foundation and that the federal NOW regulations, bank service charges, and administrative costs precluded, or should have precluded, Glaeser from expecting her nominal deposit to earn interest for her.⁹⁹

The court was not persuaded by Glaeser's argument that substantive law gave rise to a legitimate claim of entitlement to the interest. The only authority cited by Glaeser in support of her claim was *Webb's Fabulous Pharmacies, Inc. v. Beckwith*.¹⁰⁰ In that case the United States Supreme Court reviewed a Florida statute¹⁰¹ which provided that interest earned on interpleader funds deposited in the county court registry be paid to the court clerk's office. A Florida corporation had agreed to purchase all of Webb's assets before discovering that Webb's debts exceeded the purchase price. Seeking to protect itself under Florida's Bulk Sales Transfers Act,¹⁰² the purchaser filed a complaint of interpleader in circuit court and transferred the purchase price of over \$1.8 million into the court registry. During the time the funds were deposited with the court, approximately \$90,000 in interest accrued. Upon removal of the funds, the clerk deducted a service fee of approximately \$9,000.¹⁰³ When the purchaser challenged the statute as an unconstitutional taking, the Supreme Court agreed:

We hold under the narrow circumstances of this case—where there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited . . . [keeping] the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders.¹⁰⁴

99. *Id.* at 1006. The court stated that these costs would have consumed the \$.06 per month interest payment on her \$13.75. *Id.* The court also noted that even if her firm could have maintained a separate trust account for her, the subaccounting costs of approximately \$2 per month would be 30 times larger than the monthly interest generated on her deposit. *Id.* at n.6.

100. 449 U.S. 155 (1980).

101. FLA. STAT. § 676.106(4) (1977).

102. *Id.* § 676.104 (1977).

103. *Webb's*, 449 U.S. at 157-58.

104. *Id.* at 165-66.

The Eleventh Circuit agreed with the district court and distinguished *Webb's*.¹⁰⁵ The district court had emphasized that the Supreme Court invalidated the Florida statute because it exacted "two tolls": the interest accrued on the deposited funds and the service fee charged by the clerk.¹⁰⁶ While the Eleventh Circuit did not mention those features, it expressly agreed with the district court's conclusion that "[t]he crucial distinction is not the amount of interest earned, but that the circumstances [in *Webb's*] led to a legitimate expectation of interest exclusive of administrative costs and of expenses."¹⁰⁷

The Eleventh Circuit stated that because Glaeser's money had no net interest value, that is, it could not earn interest standing alone, she had no property interest in the amount generated. Thus, she had nothing that could be taken in violation of the fifth amendment. The court cautioned that it was not creating a de minimus standard for fifth amendment takings: "We do not wish to imply that the state may constitutionally appropriate property so long as the property is very small property. Here, there was no taking of any property of the plaintiff. Standing alone, her deposit in the IOTA account could not earn anything."¹⁰⁸ The court chose not to rule separately on Glaeser's due process claims, apparently affirming the district court's holding that the taking and due process claims were identical.¹⁰⁹

Florida's IOTA program thus survived its greatest challenge and received a constitutional stamp of approval by the Eleventh Circuit Court of Appeal. The United States Supreme Court denied Glaeser's petition for certiorari review.¹¹⁰

V. THE FUTURE OF IOTA PROGRAMS

Even after the Eleventh Circuit's decision in *Cone*, Florida's IOTA plan, like those in other states, has a less than certain future.

105. *Cone v. State Bar of Fla.*, 819 F.2d 1002, 1007 (11th Cir.), *cert. denied*, 108 S. Ct. 268 (1987). Several other IOTA decisions considering the taking clause violation claim have distinguished *Webb's*. See *Carroll v. State Bar of Cal.*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (1984), *cert. denied*, 474 U.S. 848 (1985). *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981); *In re New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982); *In re Adoption of Amendments to CPR 9-102*, 102 Wash. 2d 1101 (1984).

106. *Cone v. Florida Bar*, 626 F. Supp. 132, 136 (M.D. Fla. 1985), *aff'd*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 108 S. Ct. 268 (1987).

107. *Id.* at n.7.

108. *Cone*, 819 F.2d at 1007.

109. For a general discussion of the due process and equal protection arguments in the IOTA context, see *Baker & Wood*, *supra* note 95, at 341-46. See also Note, *supra* note 48, at 1021-33.

110. *Cone v. Florida Bar*, 108 S. Ct. 268 (1987). The Supreme Court has never definitively ruled on the constitutionality of the IOTA concept.

Under the present scheme, the greatest threat to the future of IOTA programs comes from advances in computer software which could improve subaccounting capabilities and therefore reduce the administrative costs of holding small, short-term funds in interest-bearing accounts. As a response to this threat, the Supreme Court of Florida should amend Florida's IOTA program to make it mandatory, so the program will achieve the ends for which it was originally designed.

A. *IOTA's Time May Be Limited*

Computer software advances in the banking industry have made possible subaccounting procedures capable of tracing small amounts of interest.¹¹¹ Banks in New York and Boston have implemented such procedures for use by law firms and insurance companies.¹¹² Taking advantage of such procedures, a firm can maintain a master account with an unlimited number of client subaccounts; bookkeeping is streamlined as only one monthly statement is sent to the firm.¹¹³ Although these subaccounting procedures have not yet caused a decrease in these IOTA program funds, IOTA directors in New York and Massachusetts believe their funds will soon be affected.¹¹⁴ The extent to which such technological advances will affect IOTA funds is unclear. What is clear, however, is that subaccounting costs will never be eliminated. The cost of a lawyer's time establishing a subaccount, or even determining whether to establish one, would consume interest generated on nominal or very short-term deposits. Still, some of the larger short-term deposits might be able to generate interest net of expenses as subaccounting costs decrease.

The above discussion raises the question of precisely what constitutes a sufficiently small or short-term deposit. As noted earlier,¹¹⁵ at least one state has outlined a "safe-harbor" amount of fifty dollars. Florida, however, has no such standard. The Supreme Court of Florida has said that attorney discretion with respect to this determination, in the absence of clear client preference, will be protected from review.¹¹⁶ The Florida Bar Foundation has not set guidelines for determining what constitutes nominal or short-term deposits, preferring instead to rely on the participating attorney's judgment. To

111. Marcotte, *supra* note 10, at 72.

112. *Id.* at 73-74. Two banks which have done so are Bankers Trust Company and State Street Bank & Trust Company. *Id.*

113. *Id.*

114. *Id.* at 74.

115. See *supra* note 28 and accompanying text.

116. *In re Interest on Trust Accounts*, 402 So. 2d 389, 394 (Fla. 1981).

assume this role the Foundation would have to monitor changes in interest rates and transaction charges by participating attorneys' banks, placing a substantial administrative burden on the Foundation. Instead, the Foundation currently relies on participating attorneys to monitor their own banks' charges and to determine the placement of client funds based on this knowledge.¹¹⁷

The absence of clear guidelines is a weakness of Florida's plan. The district court in *Cone*, although troubled by the absence of clear guidelines, implied that the question as to what constitutes a sufficiently small and/or short-term deposit incapable of generating interest independently would be irrelevant as long as the client's "bundle" of property rights is not disturbed.¹¹⁸ If clients are able to withdraw trust funds at any time and use them in any way desired, the court suggested, then the "bundle" of property rights remains intact.¹¹⁹

The threat of diminishing funds has spurred some programs to establish endowments or trust funds which might eventually generate sufficient interest to run existing programs.¹²⁰ Other programs are developing guidelines to see that the money is being used wisely.¹²¹

B. *The Case For A Mandatory IOTA*

The greatest enhancement that Florida could make to its funding of legal services to the poor would be to change its IOTA program from a voluntary to a mandatory one.¹²² After nineteen months of operation, only fifteen percent of Florida's attorneys were participating in the program.¹²³ Today, nearly five years later, participation hovers at a mere twenty percent.¹²⁴ Although IOTA participation will probably increase somewhat due to the Eleventh Circuit's ruling that

117. Telephone interview with Jane Robertson Curran, Exec. Dir. of The Fla. Bar Foundation (Mar. 7, 1988).

118. *Cone v. Florida Bar*, 626 F. Supp. 132, 137 (M.D. Fla. 1985), *aff'd*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 108 S. Ct. 268 (1987).

119. *Id.*

120. Marcotte, *supra* note 10, at 74. Washington state's IOTA program began setting aside 10% of its income in a trust fund in 1985, and, as of July 1987, the fund contained \$500,000. *Id.*

121. *Id.*

122. Although the term "comprehensive" is used more often to describe a program in which all attorneys with pooled client trust fund accounts must participate, this author uses the term "mandatory," as it better connotes the nature of this type of program. See *supra* note 39.

123. Rivlin, *supra* note 17, at 1038.

124. Telephone interview with Jane Robertson Curran, Exec. Dir. of The Fla. Bar Foundation (Mar. 7, 1988).

participation in IOTA is constitutional, adoption of a mandatory program would raise revenues dramatically.¹²⁵

The following chart¹²⁶ confirms this contention:

<u>STATE</u>	<u># ELIGIBLE ATTORNEYS</u>	<u>YEARS IN OPERATION</u>	<u>TOTAL INCOME</u>
California (C)	60,000	5	\$49,000,000
New York (V)	60,000 (14%)*	4	\$ 2,579,226
Minnesota (C)	12,000	4	\$ 6,085,078
Colorado (V)	10,000 (29%)*	4	\$ 1,405,165
Ohio (C)	26,000	3	\$ 9,906,708
Texas (V)	26,000 (20%)*	3	\$ 1,139,557
Washington (C)	8,000	3	\$ 6,195,765
Missouri (V)	9,700 (36%)*	3	\$ 593,126
Arizona (C)	7,300	3	\$ 4,115,115
Connecticut (V)	7,000 (20%)*	3	\$ 530,000
Iowa (C)	4,250	2	\$ 1,850,790
Arkansas (V)	3,812 (26%)*	2	\$ 131,822
Wisconsin (C)	8,000	1	\$ 773,339
Kentucky (V)	6,000 (23%)*	1	\$ 57,875

* percentage of eligible attorneys currently enrolled in the voluntary IOLTA program in that state.

With an IOTA program of identical operational duration and nearly the same number of eligible attorneys as that of Colorado, Minnesota's mandatory program has raised over three times the amount of money raised by Colorado's voluntary program.¹²⁷ Contrasting the programs in New York and California proves even more illustrative. California's mandatory program, with 60,000 attorneys, has raised an average of nearly \$10 million annually. By contrast, New York's voluntary program, with a similar number of attorneys,

125. It has been estimated that if the nearly \$2 billion deposited by attorneys in non interest-bearing trust accounts nationally were placed in IOTA programs at 5 1/4% interest, approximately \$100 million would be raised in one year alone. See Rivlin, *supra* note 17, at 1037.

126. ABA COMM'N. ON INTEREST ON LAWYERS' TRUST ACCOUNTS, REPORT TO THE HOUSE OF DELEGATES 3 (1988) [hereinafter ABA IOTA REPORT] (on file, *Florida State University Law Review*). The ABA IOTA Report was passed as presented at the ABA's mid-year meeting held February 4-11, 1988. Telephone interview with Deborah Baxter, ABA IOLTA Dir. (July 7, 1988).

127. *Id.*

has averaged just over \$600,000 annually. The ABA Commission on Interest on Lawyers' Trust Accounts Report to the House of Delegates (ABA IOTA Report) concluded that of the \$121 million raised by the forty-four IOTA programs to date, the eight mandatory programs have yielded \$79 million, or sixty-five percent of the total.¹²⁸

If Florida's IOTA program were made mandatory, money and time spent urging participation in the program could be redirected into the program itself. No constitutional questions or uncertainties restrain the program today.¹²⁹ Of the IOTA concept, one commentator has noted: "It does not cost the state *any money* and it is not an unreasonable burden on the banks. Yet its potential for doing a great deal of good is enormous."¹³⁰ Still, as the ABA IOTA Report seems to indicate, full potential can be met only with the imposition of mandatory participation.

The Florida Bar Foundation's initial request that the supreme court make Florida's IOTA plan mandatory met strong resistance.¹³¹ Critics argued that a mandatory program would: (1) burden attorneys with new recordkeeping requirements; (2) deprive clients of their earnings; (3) malign the public image of the legal profession; (4) create potential disciplinary problems for attorneys; (5) cause an increase in attorney malpractice insurance rates; (6) interfere with attorney-client relationships; and (7) interfere with attorney-banker relationships.¹³² Although opponents offered no factual basis for these claims, the supreme court was sufficiently impressed to delay adoption of a mandatory scheme.

Of the seven arguments, the first six are unfounded. First, the charge that a mandatory IOTA program would burden attorneys with new recordkeeping requirements exaggerates the imposition. Participation in the current voluntary plan requires little bookkeeping, only time to fill out and send two simple forms to the Foundation. A mandatory plan would create little, if any, additional burden.

128. *Id.*

129. However, at least one commentator has suggested that if Florida's program were made mandatory it would constitute taxation without representation and therefore be unconstitutional. See Note, *Interest on Attorney Trust Accounts: A Questionable Approach in Florida*, 8 STETSON L. REV. 413, 427 (1979). Moreover, the lack of guidelines as to what amount of money is nominal and what amount of time is short-term could lead to another court challenge. The lack of guidelines was not addressed by the Eleventh Circuit in *Cone v. State Bar of Fla.*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 108 S. Ct. 268 (1987).

130. Civiletti & Machen, *The Case for IOLTA*, 70 A.B.A. J. 16 (1984) (emphasis added).

131. *In re Interest on Trust Accounts*, 402 So. 2d 389, 394 (Fla. 1981).

132. *Id.*

Second, the argument that clients of attorneys who participate in Florida's IOTA program are deprived of their earnings was disproved by the Eleventh Circuit's decision in *Cone*. As the court pointed out, the IOTA program utilizes only those funds which could not generate sufficient interest to cover administrative charges. Using these funds consequently deprives the client of nothing.

Third, the charge that IOTA maligns the public image of the legal profession is untrue. If anything, a mandatory IOTA would enhance the profession's image. Interest earned would go to law-related public services such as the delivery of legal services to the poor, rather than to subsidize mutually beneficial attorney-banker relationships.

Fourth, the charge that a mandatory IOTA program would lead to an increase in attorney malpractice insurance rates is grounded on the assumption that IOTA is unconstitutional and assumes that clients could seek restitution for lost funds. The *Cone* decision dispelled this argument as well.

Fifth, the argument that a mandatory IOTA program would interfere with attorney-client relationships is a spurious one. Undoubtedly, most clients who know their trust funds are insufficiently large or long-term to earn interest net of expenses for them would not object to the use of their funds in the program. In addition, a client's participation in the determination of whether to place funds in the IOTA program is precluded by the assignment of income doctrine, which would result in the client's suffering tax consequences. In any event, the attorney-client relationship would not appear to suffer substantially.

The sixth charge, that a mandatory program would generate disciplinary problems, is also unfounded. As noted earlier, the ABA Standing Committee on Ethics and Professional Responsibility has determined participation in an IOTA program to be ethical.¹³³ While the opinion does not address mandatory programs in particular, the ABA has unanimously recommended that states with voluntary IOTA programs convert to mandatory ones.¹³⁴

Only the seventh charge, that a mandatory IOTA plan would interfere with attorney-banker relations, is true. A mandatory program would interfere with agreements, express and implied, that an attorney deposit all client trust funds with the bank and agree not to participate in the IOTA program. In exchange for the bank's free use of these funds, an attorney or firm often receives a low-interest loan or

133. See ABA Formal Op. 348, *supra* note 12.

134. See ABA IOTA Report, *supra* note 126.

free banking services. Such an agreement is discretely referred to as a "compensating balances" relationship.

While not expressly proscribed by any of the rules regulating attorneys, the practice of "compensating balances" is nevertheless shadowed by accusations of professional impropriety. This was suggested during oral argument of *In re Emergency Delivery of Legal Services to the Poor*,¹³⁵ which involved a petition to amend the Integration Rule of The Florida Bar to require mandatory pro bono services of state bar members. The proposed amendment would have required Bar members annually to donate either twenty-five hours of legal service to the poor or \$500 to The Florida Bar Foundation, or to participate in Florida's IOTA program.¹³⁶ In a pleading urging denial of the amendment, the Palm Beach County Bar Association offered the following argument:

For many lawyers and firms, participation in IOTA will remain unattractive. What if a lawyer or firm has a long-standing, cherished, and valuable relationship with a banking institution which frowns on IOTA participation? If the lawyer or firm represents the bank, there may be a significant risk of losing some or all of the bank's legal business. Even if that risk is slight, or even if the lawyer or firm does not represent the bank, there could be a very real loss of economic power to obtain financing on favored terms.¹³⁷

At oral argument, former Florida Supreme Court Chief Justice James Alderman said that "lawyers are not supposed to earn interest or otherwise gain from their clients' trust accounts," and questioned whether the lawyers' borrowing posture is an ethical consideration.¹³⁸

Chief Justice Alderman may have based his remark on Canon 11 of the Canons of Professional Ethics, which prohibits a lawyer from using a client's money for his personal benefit;¹³⁹ or on Canon 9 of the Model Code of Professional Responsibility, which provides that

135. 432 So. 2d 39 (Fla. 1983).

136. *Id.* at 40.

137. Response of Palm Beach County Bar Ass'n to Emergency Petition to Amend the Integration Rule By the Addition of an Article Entitled "Delivery of Legal Services to the Poor," No. 62,889 (on file, *Florida State University Law Review*). The supreme court denied the Petition. *In re Emergency Delivery of Legal Services to the Poor*, 432 So. 2d 39 (Fla. 1983).

138. Miami Herald, Feb. 12, 1983, at 6, col. 1.

139. CANONS OF PROFESSIONAL ETHICS Canon 11 (1908) ("Money of the client . . . coming into the possession of the lawyer . . . should not under any circumstances be commingled with his own or be used by him.").

a lawyer should avoid "even the appearance of impropriety."¹⁴⁰ Although the more recent Model Code's Canon 9 does not contain the exact language of Canon 11, the ABA has noted that the drafters of the Model Code had no intention of relaxing the longstanding restrictions on the use of client funds.¹⁴¹

The Supreme Court of Florida underscored the Canon 11 standard when it noted in *Jungbluth v. American Bank and Trust Co.*¹⁴² that "[n]o rule of law is better settled than that a trustee cannot use trust property or his relation to it for his personal advantage."¹⁴³ The court has also noted that "[f]ew breaches of ethics are as serious as the commingling of a client's funds and the use thereof for the lawyer's private purposes."¹⁴⁴ Undoubtedly, the receipt of a low-interest loan or free banking services constitutes a personal benefit. Thus, the "compensating balances" relationships between attorneys and their banks appear to constitute a breach of ethics. As the Model Code's Canon 9 cautions, lawyers should guard against "even the appearance of impropriety."¹⁴⁵

In 1967, the ABA declared that the use of interest earned on a pooled client fund savings account to defray costs of a law firm's account would violate Canon 11 of the Canons of Professional Ethics.¹⁴⁶ Practices found in "compensating balances" relationships such as the exchange of the free use of interest for free banking services or low-interest loans appear to constitute the type of practice condemned by the ABA as early as 1967. On the state level, the Ethics Committee of The Florida Bar has ruled that a lawyer's earning a secret commission through the placement of client funds in a bank, without client knowledge and consent, is unethical.¹⁴⁷ A lawyer's tacit receipt of benefits from a bank free of charge—benefits that would otherwise cost money—is tantamount to obtaining a "secret commission." Thus, the Ethics Committee of The Florida Bar has also condemned the practices found in the "compensating balances" relationship.

140. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980). In 1970, Florida adopted the Model Code of Professional Responsibility. In 1986, the Supreme Court of Florida adopted the Model Rules of Professional Responsibility. See *In re Rules Regulating The Fla. Bar*, 494 So. 2d 977 (Fla. 1986), *modified*, 507 So. 2d 1366 (Fla. 1987).

141. ABA Informal Op. 348, *supra* note 12.

142. 101 Fla. 289, 134 So. 618 (1931).

143. *Id.* at 291, 134 So. at 619.

144. *State v. Ruskin*, 126 So. 2d 142, 143 (Fla. 1961).

145. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980).

146. ABA Comm. on Professional Ethics, Informal Op. 991 (1967), *excerpted in* 68 A.B.A. J. 1502, 1504 (1982).

147. The Florida Bar Comm. on Professional Ethics, Advisory Op. 63-14 (July 11, 1963).

A court in at least one other state has recognized this conflict. In *Meyer v. Meyer*,¹⁴⁸ the Supreme Court of Mississippi held that trustees who deposited trust funds with a bank that granted them a low-interest loan would be liable for the profits made by the use of the funds if the low-interest loan was conditioned upon the deposit of the funds with the bank.¹⁴⁹ The trustees in *Meyer*, who were engaged in a "compensating balances" relationship with their bank, were held liable for the profits earned from the use of the trust funds. Should not lawyers engaging in "compensating balances" relationships with banks today be held similarly liable?

The American Bar Association, The Florida Bar, and the courts of a nearby state have all condemned the "compensating balances" relationship. At the very least, these rulings have cast an appearance of impropriety over this behavior. Accordingly, these practices should be discontinued. However, it is unrealistic to assume that all attorneys will end such relationships absent an advisory opinion to that effect. It is not known how pervasive these practices are, but logic suggests that many attorneys refusing to participate in Florida's program have chosen so in order to perpetuate an economically beneficial "compensating balances" relationship. Making Florida's program mandatory would obviate the conflict. Given a choice, it is likely that many attorneys would prefer a mandatory IOTA program to a program like the one considered in *In re Delivery of Legal Services to the Poor*,¹⁵⁰ which would have required attorneys to perform a certain amount of pro bono work each year or pay an annual fee to a state legal aid program. Absent other improvements to the delivery of legal services to the poor, such a proposal could be adopted. A mandatory IOTA program would improve the provision of legal services to the poor, but would not be as intrusive, at least in terms of attorney time and expense, as a mandatory pro bono program.

On April 6, 1988, State Representatives Lawson, Gordon, and Rudd filed House Bill 1191, which required Florida Bar members to create and maintain an interest-bearing trust account for nominal or short-term client funds for the benefit of The Florida Bar Foundation.¹⁵¹ This legislation also provided that the Foundation administer the proceeds for the benefit of low-income persons unable to afford private legal counsel and for the administration of justice,¹⁵² essen-

148. 6 Miss. 638, 64 So. 420 (1914).

149. *Id.* at 647, 64 So. at 425.

150. 432 So. 2d 39 (Fla. 1983).

151. Fla. HB 1191 (1988).

152. *Id.*

tially the same purposes as those contained in Florida's current voluntary plan. Finally, the bill specified that, except as provided in the legislation, all such interest-bearing trust accounts be governed by the applicable rules of the Supreme Court of Florida. The legislation would have become effective on October 1, 1988.¹⁵³ Senators Frank, Thomas, Jenne and Grant filed identical legislation, Senate Bill 988, on April 7, 1988.¹⁵⁴

Neither bill emerged from committee. House Bill 1191 was referred to the House Judiciary Committee on April 12, 1988, and subsequently subreferred to the Subcommittee on Court Systems, Probate and Consumer Law.¹⁵⁵ The bill was never put on the committee agenda and died in committee.¹⁵⁶ Senate Bill 988 suffered a similar fate: it was referred to the Senate Judiciary-Civil Committee on April 18, 1988,¹⁵⁷ but was never placed on the committee agenda, even though three time extensions were granted.¹⁵⁸

A letter from Representative Hamilton Upchurch, Chairman of the House Judiciary Committee, to Chief Justice Parker Lee McDonald of the Supreme Court of Florida, suggests why these bills died.¹⁵⁹ In the letter, Representative Upchurch expressed his concern that the House Bill sought to regulate an aspect of legal practice within the exclusive jurisdiction of the court.¹⁶⁰ Representative Upchurch concluded that the issue would be more appropriately addressed in the judicial rather than legislative forum.¹⁶¹

The Florida Bar Foundation is currently implementing a drive to increase participation in the voluntary program. In addition, on July 5, 1988, the Foundation petitioned the Supreme Court of Florida for a rule change creating a comprehensive IOTA program for the state.¹⁶² In May 1988, The Florida Bar Board of Governors voted to

153. *Id.*

154. Fla. SB 988 (1988).

155. FLA. LEGIS., HISTORY OF LEGISLATION, 1988 REGULAR SESSION, HISTORY OF HOUSE BILLS at 272, HB 1191.

156. *Id.*

157. FLA. LEGIS., HISTORY OF LEGISLATION, 1988 REGULAR SESSION, HISTORY OF SENATE BILLS at 230, SB 988.

158. *Id.*

159. Letter from Rep. Hamilton D. Upchurch to then-Chief Justice Parker Lee McDonald of the Supreme Court of Florida (Apr. 13, 1988) (on file, *Florida State University Law Review*).

160. *Id.*

161. *Id.*

162. The Foundation's specific request was for entry of an Order modifying the Rules Regulating Trust Accounts by amending Rule 5-1.1(d) of the Rules Regulating The Florida Bar. *1988 Petition to Amend Rules*, *supra* note 10, at 1. As of this writing, the supreme court has heard oral argument but has not rendered a decision.

endorse the Foundation's petition on the conditions that the Board be given authority to appoint The Florida Bar Foundation Directors and that ten percent of IOTA proceeds be allotted to a fund promoting public information programs relating to the legal system.¹⁶³ But on September 30, 1988, the Board voted 22-19 to withdraw support for a comprehensive program, endorsing instead a mandatory IOTA program with an opt-out provision.¹⁶⁴

Opt-out programs are currently in use in eight states and the District of Columbia,¹⁶⁵ where attorneys are required to participate absent the attorney's affirmative request not to participate. If the supreme court decides against adopting a mandatory program, the court could fall back on the opt-out approach. Such a change would capture the participation of those attorneys unaware of the IOTA program. Nevertheless, an opt-out program would not reach those who wish to maintain a "compensating balances" relationship with their banks. Accordingly, adoption of a mandatory IOTA program would be preferable to an opt-out program. In addition to creating a greater funding base, the mandatory program would eliminate expensive, time-consuming recruitment drives as well as the shadow of impropriety surrounding the "compensating balances" issue. As the court considers the alternatives, the Ethics Committee of The Florida Bar should render an advisory opinion on the "compensating balances" relationship that exists between many attorneys and banks in Florida.

The Supreme Court of Florida should amend The Florida Bar's Rules to make the state's IOTA program mandatory. First, the American Bar Association¹⁶⁶ has recommended that the program be made mandatory. Second, this court has long recognized the unavailability of adequate legal representation for Florida's lower-income residents, as well as its own obligation to promote the delivery of legal services to all aspects of society.¹⁶⁷ A mandatory IOTA program would undoubtedly raise additional funds which could be used to increase the availability of legal services to the poor.

163. Telephone interview with Jane Robertson Curran, Exec. Dir. of The Fla. Bar Foundation (May 23, 1988). The Directors are currently named through automatic appointments, by the Board or judiciary, or through elections at an annual meeting. Press Release of The Florida Bar (May 25, 1988) (on file, *Florida State University Law Review*).

164. *Comprehensive IOTA Support Dropped*, Fla. Bar News, Oct. 15, 1988, at 1, col. 1.

165. See *supra* note 41.

166. See ABA IOTA REPORT, *supra* note 126.

167. See Maher, *No Bono: The Efforts of the Supreme Court of Florida to Promote the Full Availability of Legal Services*, 41 U. MIAMI L. REV. 973 (1987).

VI. CONCLUSION

After nearly ten years of study and review, tangles with the IRS, and struggle over changes in federal banking regulations, Florida's Interest on Trust Account program became a reality in late 1981. Four years and nearly \$6 million later, the program faced a challenge that it constituted an uncompensated taking in violation of the fifth and fourteenth amendments to the United States Constitution. In *Cone v. State Bar of Florida*, the Eleventh Circuit held that Florida's program was constitutional, and the Supreme Court denied certiorari. As a result, new life was given to Florida's program as well as to those of the forty-seven states and the District of Columbia which had fashioned their own programs largely after Florida's. The future of all state programs, however, remains somewhat unclear, as advances in subaccounting procedures threaten to diminish the pool of available funds. Nevertheless, the prospects of a healthy future for Florida's IOTA plan can be enhanced by the establishment of endowment funds and, more importantly, the adoption of a mandatory program.

The Florida IOTA plan has had a positive effect on the provision of legal services to the poor in the state. Just when the federal government began cutting back allocations to state legal aid programs, IOTA funds filled some gaps. However, legal aid societies and programs are still seriously underfunded. Action by the Supreme Court of Florida imposing mandatory participation in the IOTA plan by all Florida attorneys would result in increased funding of these programs and would put an end to "compensating balances" relationships between attorneys and their banks. IOTA is constitutional. Now is the time to make it mandatory.